

VENGATASELAM CHELLAPPAN v. FEDERAL POWER SDN BHD

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HIGH COURT MALAYA, SHAH ALAM
TUN ABD MAJID TUN HAMZAH JC
[CIVIL APPEAL NO: BA-16-24-12-2017]
18 MARCH 2019

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LABOUR LAW: *Employment – Termination benefits – Claim for – Machine operator – Whether claim by complainant fell under category of manual labour – Whether duties substantially or purely physical in nature with very little or no mental effort – Whether claim should be treated as one under s. 69(1) of Employment Act 1955 – Whether complainant entitled to claims under Employment (Termination and Lay-Off Benefits) Regulations 1980 and ss. 12(2)(c), (3) & 60E(3A) of Employment Act 1955*

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LABOUR LAW: *Collective agreement – Terms and conditions of CA – Expiry of – Whether provisions of terms and conditions of employment shall prevail until superseded by new terms – Whether provision would amount to terms in contract of service*

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The appellant ('complainant') had been a machine operator since 25 May 1981 with the respondent's company ('company') until the company decided to close down its operation temporarily in June 2017. According to the complainant, he did not receive the benefits that were due to him and filed a complaint with the Labour Office 2 June 2017 and claimed for: (i) wages from January to March 2017 amounting to RM7,050; (ii) termination benefits amounting to RM148,050; (iii) wages *in lieu* of notice amounting to RM5,544; and (v) wages *in lieu* of annual leave for 11 days amounting to RM994.23. The Director General of Labour ('DGL') decided pursuant to s. 69B of the Employment Act 1955 ('Act') as the complainant earned more than RM2000, that the complainant was entitled to three months wages amounting to RM6,249.75 which was not disputed by the company. However, the rest of his claims were dismissed. According to the DGL, the wages *in lieu* of notice and annual leave were based on the interim agreement which was entered between the company and their employees while the termination benefits was based on article 29(h)(iii) of the 9th Collective Agreement ('CA') between the company and the Electrical Industry Workers' Union which was enforceable from 1 January 2011 to 31 December 2013. Upon the expiry of the CA, the National Union did not pursue their action in the Industrial Court and the Award 1012 Tahun 2017 was delivered on 19 July 2017 after the complainant and other employees were terminated. There was no extension or further collective agreement signed. The company's union, not being registered under s. 10 of the Trade Union Act 1959 ('TUA'), had no right to any benefit, privilege or protection. Dissatisfied, the complainant appealed against the decision of the DGL. The complainant submitted, *inter alia*, that: (i) the DGL had wrongly treated his claim under s. 69B of the Act when the case should be treated under s. 69(1)

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A of the Act; and (ii) despite the CA having an expiry date *ie*, 31 December 2013, it had a continuity clause and would be enforceable until being superseded.

Held (allowing appeal with costs):

- B (1) The DGL decided to treat this claim under s. 69B of the Act owing to the fact that the complainant earned more than RM2000 and did not consider whether the complainant could fall under the category of manual labour. In law, a person is not deemed to be ‘engaged in manual labour’ if his job functions are primarily and substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law ‘engaged in manual labour’ if his duties are substantially or purely physical in nature with very little or no mental effort.’ Based on para. 2 of the First Schedule to the Act, manual labour clearly extends to a supervisor. The job description – machine operator – was certainly not a desk job. Subparagraph 2(3) includes a supervisor, and hence, being a machine operator, the complainant’s claims should be treated as one under sub-s. 69(1) of the Act. (paras 15 & 16)
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- E (2) The interim agreement was not valid as the union was not registered under s. 10 of the TUA and was not deposited with the Registrar under s. 16, and hence, not recognised by virtue of s. 17 of the IRA. Therefore, no claim could be premised upon the interim agreement. The letter of offer also did not provide for any benefits. The benefits for the complainant were available in the Employment (Termination and Lay-Off Benefits) Regulations 1980 in respect of entitlement to 20 days’ wages for every year of employment for service more than five years. Wages *in lieu* of notice could be found in sub-s. 12(3) read together with sub-s. 12(2)(c) of the Act and wages *in lieu* of annual leave was provided for under s. 60E(3A) of the Act. The complainant was entitled to these benefits. (paras 14 & 17)
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- G (3) Article 2(d) of the CA provides that ‘Either party may serve on the other three months written notice to negotiate on new terms and conditions of employment and other related matters but no such notice shall be served earlier than 1 October 2013. The party that serves the notice shall also submit proposals on new terms and conditions of employment for negotiation. The provisions of the current terms and conditions of employment shall prevail until superseded by new terms concluded between the parties or awarded by the Industrial Court.’ When the National Union withdrew the action, the Industrial Court handed down Award 1012 Tahun 2017, which meant that the parties were not proceeding with the new CA. Thus, the terms of the CA should be applicable at least until 19 July 2017. (paras 18 & 19)
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Case(s) referred to:

Colgate Palmolive Sdn Bhd v. Cheong Foo Weng [2001] 1 LNS 394 HC (*refd*)

Jaques v. Owners of the Steam Tug Alexandra [1921] 2 AC 339 (*refd*)

Kesatuan Pekerja-Pekerja Perakayuan v. Syarikat Jengka Sdn Bhd [1997] 2 CLJ 276 CA (*refd*)

Leighton Contractors (M) Sdn Bhd v. Gnanaprasagam Arukiam & Ors [2018] 4 CLJ 800 HC (*refd*)

Malayan Commercial Banks' Association and Association of Bank Officers, Peninsular Malaysia [1988] 1 ILR 280 (*refd*)

National Union Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn Bhd [1986] 1 CLJ 474; [1986] CLJ (Rep) 193 FC (*refd*)

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC (*refd*)

Re Gardner [1938] 1 All ER 20 (*refd*)

Uvarajah Kanasevan & Anor v. Penolong Pengarah Buruh, Butterworth & Ors [1992] 3 CLJ 1353; [1992] 1 CLJ (Rep) 348 SC (*refd*)

Legislation referred to:

Employment Act 1955, ss. 12(2)(c), (3), 60E(3A), 69(1), 69B, 70

Employment (Termination and Lay-Off Benefits) Regulations 1980, regs. 4, 6

Industrial Relations Act 1967, ss. 17(2), 18(1), 26(2)

Trade Union Act 1959, s. 10

For the appellant - Arun Kumar; M/s Arun Kumar & Assocs

For the respondents - RM Murali; M/s Ramadass & Assocs

Reported by S Barathi

JUDGMENT**Tun Abd Majid Tun Hamzah JC:**

[1] The complainant (appellant) being dissatisfied with the decision of Director General of Labour ("DGL") which dismissed his claims for termination benefits, wages *in lieu* of notice and wages *in lieu* of annual leave has appealed against the said decision. Having heard the arguments, I have allowed his appeal.

[2] He had been a machine operator since 25 May 1981 with the respondent's company (company) until the company decided to close down its operation temporarily in June 2017. According to the complainant he did not receive the benefits that were due to him and filed a complaint with the Labour Office Subang Jaya on 2 June 2017. His claims were as follows:

- (i) wages from January to March 2017 amounting to RM7,050;
- (ii) termination benefits amounting to RM148,050;
- (iii) wages *in lieu* of notice amounting to RM5,544; and
- (iv) wages *in lieu* of annual leave for 11 days amounting to RM994.23.

Pursuant to this complaint the company was summoned to appear at the said Labour Office on 16 June 2017. After several mentions eventually the hearing was set down on 25 October 2017. Attempts to having the claims resolved failed during the mention dates.

- A [3] The DGL decided that the claims were inquired and decided pursuant to s. 69B of the Employment Act 1955 (“Act”) as the complainant earned more than RM2,000 and the complainant was entitled to three month wages amounting to RM6,249.75 which was not disputed by the company. However, the rest of his claims were dismissed. According to the DGL the wages *in lieu* of notice and annual leave were based on an agreement (“interim agreement”) which was entered between the company and their employees while the termination benefits was based on art. 29(h)(iii) of the 9th Collective Agreement (“CA”) between the company and the Electrical Industry Workers’ Union (“EIWU”) which was enforceable from 1 January 2011 to 31 December 2013 and there was no extension or further collective agreement signed. The company’s union not being registered under s. 10 of the Trade Union Act 1959 had no right to any benefit, privilege or protection.
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- D [4] In this appeal, learned counsel for the complainant submitted that the DGL had wrongly treated this claim under s. 69B of the Act. According to learned counsel, notwithstanding the complainant’s wages was RM2,359 being a manual worker, for the purposes of the Act he remained under the First Schedule. Hence, his case should be treated under s. 69(1) of the Act. More so when the DGL had found that the CA did not apply to the complainant. He relied on *Leighton Contractors (M) Sdn Bhd v. Gnanaprasagam Arukiam & Ors* [2018] 4 CLJ 800; [2016] 6 MLRH 585.
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- F [5] It was further submitted that the CA despite having an expiry date ie, on 31 December 2013 it has a continuity clause and would be enforceable until being superseded. The effect of Award 1012 Tahun 2017 does not mean that there would not be any further collective agreement as the company or the Minister under sub-s. 18(1) or 26(2) of the Industrial Relations Act 1967 (“IRA”) could still refer the matter to the Industrial Court should there be any trade dispute in future, more so when the company’s memo stated that the operation was ceased temporarily. The interim agreement was never registered under the Trade Union Act 1959 (“TUA”). Therefore, the DGL ought to have held that the CA was applicable and that the provisions of the same would amount to the terms in the contract of service. He referred to *Uvarajah Kanasevan & Anor v. Penolong Pengarah Buruh, Butterworth & Ors* [1992] 3 CLJ 1353; [1992] 1 CLJ (Rep) 348.
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- H [6] In addition, learned counsel contended that there are provisions like regs. 4 and 6 of the Employment (Termination and Lay-Off Benefits) Regulations 1980 in respect of entitlement to 20 days’ wages for every year of employment for service more than five years, wages *in lieu* of notice under sub-s. 12(3) read together with sub-s. 12(2)(c) of the Act and wages *in lieu* of annual leave under sub-s. 60E(3A) of the Act and the DGL should have determined whether these benefits were available to the complainant.
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- [7] Learned counsel pointed out the DGL was further in error in splitting the claim where she ruled the wages *in lieu* of notice and *in lieu* of annual leave fell under the interim agreement while the termination benefits was under the 9th Collective Agreement. She should have placed all three under the 9th Collective Agreement. Although the National Union was no longer interested to have a new collective agreement and withdrew the Industrial Court action by reason that there were no more employees within its scope in the company it did not mean the terms of the CA were not applicable as it has not been superseded as provided for under art. 2(d). Reference was made to *National Union Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn Bhd* [1986] 1 CLJ 474; [1986] CLJ (Rep) 193, *Kesatuan Pekerja-Pekerja Perakayuan v. Syarikat Jengka Sdn Bhd* [1997] 2 CLJ 276 and sub-s. 17(2) of the IRA. A B C
- [8] It was not in dispute that the interim agreement could not stand hence, the DGL should have ascertained whether the wages *in lieu* of notice and annual leave were available under the CA particularly so when she considered the termination benefits were available under the CA. D
- [9] Learned counsel for the company submitted that in view of the expiry of the CA and the National Union did not pursue their action before the Industrial Court (Award 1012 Tahun 2017), the DGL was correct in holding that the CA could no longer be relied upon. And the invalidity of the interim agreement was not disputed. Therefore, the claims were rightly dismissed. E
- [10] He argued that the complainant earned RM2,359 a month. On this fact alone the First Schedule did not apply to the complainant. There was no evidence led to show that the complainant was a manual labour. The job description was not the determining factor. In support, he referred to *Colgate Palmolive Sdn Bhd v. Cheong Foo Weng* [2001] 1 LNS 394; [2001] 7 MLRH 386. F
- [11] It was also pointed out that the complainant in his statement of claim advanced his case under the interim agreement therefore, the complainant was bound by his statement of claim and referred to *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629 where the Federal Court held that the rule of pleadings for hearings in the Industrial Court and the same should apply in the inquiry conducted by the DGL. G
- [12] It was further submitted that there was no dispute that the interim agreement was not valid and the CA being expired the DGL correctly dismissed the complainant's claims. As regards the CA, the National Union withdrew the action in the Industrial Court. Article 2(d), according to learned counsel for the company was to cover the negotiation process for the 10th Collective Agreement is signed. In support of this contention he referred to *Malayan Commercial Banks' Association and Association of Bank Officers, Peninsular Malaysia* [1988] 1 ILR 280. H I

- A [13] Subsection 17(2) of the IRA can only be used during the contractual period of the CA and not thereafter. Therefore, learned counsel submitted that complainant's reliance on the said provision was misconceived.

Decision

- B [14] The complainant categorically told the DGL during the hearing that he wanted to claim what was provided for under the interim agreement. He said as follows:

- C Saya minta apa yang saya kerja di Federal Power. Syarikat ada buat perjanjian dengan pekerja-pekerja Kesatuan. Saya nak tuntutan seperti apa yang ada dalam itu. Saya mahu tuntutan seperti apa yang dijanjikan dalam Interim Agreement (C1).

Sebab sebelum ini syarikat ikut agreement yang ada dalam Kesatuan sekerja dalaman. Saya pernah dapat bonus. Jadi saya tahu syarikat memang ikut ini.

- D It was apparent that he was not aware of the legality of the interim agreement. His counsel did not dispute that the interim agreement was not valid as the union was not registered under s. 10 of the TUA. The interim agreement too was not even deposited with the Registrar under s. 16 hence not recognised by virtue of s. 17 of the IRA. Obviously therefore, no claim could be
E premised upon the interim agreement. The letter of offer too did not provide for any benefits. The contract of service was not made available and nothing being said about it. I suppose here the letter of offer dated 15 May 1981 was considered as the contract of service according to the DGL.

- F [15] The DGL decided to treat this claim under s. 69B of the Act simply owing to the fact that the complainant earned more than RM2,000. The issue raised by learned counsel for the complainant was that notwithstanding the amount of salary he received, the complainant was in the category of manual labour. I agree that the DGL did not consider whether the complainant could fall under this category. In *Colgate Palmolive (supra)* at p. 387 Faiza Tamby
G Chik J held:

It is clear from the authorities on this point that the test postulated by the Courts to determine whether or not a person is "engaged in manual labour" is as follows:

- H what is the substantial/dominant purpose of the employment, to the exclusion of the matters which are incidental or accessory to the employment?

- I Thus, it is essential to determine whether the work in question is purely physical in nature, as opposed to work which has a physical/manual content but which is really dependent upon acquired skill, knowledge or experience. In law, a person is not deemed to be "engaged in manual labour" if his job functions are primarily and substantially dependent on his acquired skill, knowledge or experience but with incidental manual work. Conversely, a person is in law "engaged in manual labour" if his duties are substantially or purely physical in nature with every little or no mental effort.

The learned judge did refer to *Re Gardner* [1938] 1 All ER 20 and *Jaques v. Owners of the Steam Tug Alexandra* [1921] 2 AC 339 where it was held that it was extremely unwise to rely on the job designation or the title of the job. But at the same time the authorities did say each case must be determined on its own set of facts.

[16] The First Schedule to the Act provides:

1. ...

2. Any person who, irrespective of the amount of wages he earns in a month, has entered into a contract of service with an employer in pursuance of which:

(1) he is engaged in manual labour including such labour as an artisan or apprentice:

Provided that where a person is employed by one employer partly in manual labour and partly in some other capacity such person shall not be deemed to be performing manual labour unless the time during which he is required to perform manual labour in any one wage period exceeds one-half of the total time during which he is required to work in such wage period;

(2) he is engaged in the operation or maintenance of any mechanically propelled vehicle operated for the transport of passengers or goods or for reward or for commercial purposes;

(3) he supervises or oversees other employees engaged in manual labour employed by the same employer in and throughout the performance of their work;

...

Reading para. 2 of the First Schedule clearly manual labour extends to a supervisor. I am aware that there was no evidence led by the complainant as to what did he do as a machine operator. He was not represented and the DGL did not bother to inquire as her mind was fixed that sub-s. 69(1) did not apply as the complainant earned more than RM2,000. To my mind, the job description – machine operator is certainly not a desk job. Sub-paragraph 2(3) includes a supervisor hence being a machine operator from bottom to top remains a machine operator and therefore the complainant's claims should be treated as one under sub-s. 69(1) of the Act.

[17] Section 69 of the Act provides as follows:

69(1) The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under:

(a) any term of the contract of service between such employee and his employer;

(b) any of the provisions of this Act or any subsidiary legislation made thereunder; or

- A (c) the provisions of the Wages Councils Act 1947 (Act 195) or any order made thereunder,
and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.
- B The complainant's contract of service, as I said, provides for no benefits. Therefore, this court needs to consider whether there are benefits available in (b) or (c). I agree with learned counsel for the complainant that they are available in the Employment (Termination and Lay-Off Benefits) Regulations 1980 in respect of entitlement to 20 days' wages for every year
- C of employment for service more than five years, wages *in lieu* of notice under can be found in sub-s. 12(3) read together with sub-s. 12(2)(c) of the Act and wages *in lieu* of annual leave is provided for under sub-s. 60E(3A) of the Act. And I do so hold that the complainant is entitled to these benefits.
- D [18] As regards the CA, I take this as an alternative solution. Article 2(d) provides:
Either party may serve on the other three months written notice to negotiate on new terms and conditions of employment and other related matters but no such notice shall be served earlier than 1st October 2013. The party that serves the notice shall also submit proposals on new terms and conditions of employment for negotiation. The provisions of the current terms and conditions of employment shall prevail until superseded by new terms concluded between the parties or awarded by the Industrial Court.
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- F When the National Union withdrew the action, the Industrial Court handed down Award 1012 Tahun 2017 which means parties were not going for the 10th Collective Agreement.
- G [19] In *Syarikat Jengka (supra)* the Court of Appeal dealt with art. 38 governing the duration and termination of the collective agreement which provides as follows:
Article 38: Duration And Termination
95. This agreement shall remain in force for a period of three (3) years from 1 January 1985 and continue to be in force unless terminated by three (3) months' notice in writing given by either party to the other party on or after 1 October 1987.
- H 96. However, this agreement shall continue to be in force until a new collective agreement comes into effect even after expiry of this period.
97. During the currency of this agreement, neither party shall seek to verify, modify, annul or add to any of its terms in any way whatsoever save by operation of law or mutual agreement.
- I 98. In the event both parties agreeing to vary any of the terms of the agreement, both parties shall jointly deposit such variation of the terms of agreement with the Industrial Court for its cognisance within one month from the date of agreement on the said variation.

The Court of Appeal held as follows:

In our judgment, arts. 38(95) through (99) provide the machinery by which the parties are to harmoniously negotiate the wages and other basic amenities of the workmen in the employ of the respondent. The effect of these clauses may, we think, be summed up as follows:

- (1) The life of the collective agreement shall be three years from 1 January 1985 until 31 December 1987.
- (2) If the union wishes to negotiate a fresh agreement that would govern the benefits of the workmen after the aforesaid three year period, it must give a three-month notice and forward its new proposals for the respondent's consideration.
- (3) Until a new agreement has been concluded, the collective agreement is to remain in place in order to ensure that the workmen will not receive any lesser benefits than those already in existence.

When viewed in this manner and reading arts. 38(95) through (99) as a whole, we are driven to the conclusion that the parties intended the collective agreement to remain in force until it was replaced by another agreement.

I do not see any other interpretation or effect that can be given to art. 2(d) of the CA. True that the National Union withdrew the reference to the Industrial Court and that puts an end to the said CA. There is no purpose to proceed with the new collective agreement because the workers were terminated. Award 1012 Tahun 2017 was delivered on 19 July 2017 which was after the complainant and other employees were terminated. Thus, to my mind, the terms of the CA should be applicable at least until 19 July 2017. I do not think the company could argue that the CA ceases to apply when the CA expired in 2013. If that argument is correct then what would be the benefits available to the workers between 1 January 2014 and 19 July 2017? The interim agreement is invalid. The letter of offer cum contract of service does not help. Therefore, it would be either the statutory provisions which I have referred to earlier, alternatively, the CA.

[20] With respect to the contention that the complainant was bound by his statement of claim, s. 70 of the Act provides that a complainant needs to present a written statement of his complaint for the purposes of examination by the DGL. Looking at the scheme of the process I do not think the complainant is expected to come up with the kind of statement of claim in civil litigation and I do not think it is fair to extend the procedure for Industrial Court's hearing to the inquiry held by the DGL.

[21] Based on the above discussions the appeal is allowed with costs.